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No. 83-1173

In the Supreme Court of the United States

OCTOBER TERM, 1983

FEDERAL ENERGY REGULATORY COMMISSION,
PETITIONER

v.

INTERSTATE NATURAL GAS ASSOCIATION
OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In our petition, we argued that the Commission reasonably interpreted the Natural Gas Policy Act of 1978 (NGPA) as permitting producers to collect up to the applicable maximum lawful price for each MMBtu delivered in a first sale, and that, in order to achieve that goal, the Commission was obligated under the Act to adopt a Btu measurement technique that accurately reflects the Btu content of the gas "as delivered." We pointed out that the court of appeals' contrary conclusion has no direct support in the language or history of the NGPA but rests in-

stead on speculation and surmise, which provide a wholly inadequate basis for departing from the Commission's reasonable interpretation. Finally, we noted that, regardless whether the NGPA required adoption of the Commission's rule, the consequence of the court of appeals' decision is to preclude the Commission from ever adopting such a rule, a result that is completely at odds with the Commission's broad rulemaking authority under the Act.

1. Respondents arrive at the same conclusion as the court of appeals, although they take somewhat different routes. The defects in respondents' disparate approaches merely serve to underscore the basic error of the court of appeals.

Respondent Associated Gas Distributors (AGD) asserts (Br. in Opp. 5) that there is "overwhelming evidence that Congress intended to carry over wet measurement techniques to the NGPA." This assertion is undercut by the court of appeals' own statements acknowledging that "[t]he NGPA does not expressly provide for either a wet or a dry determination of Btu content" (Pet. App. 19a) and that "there are no indications in the NGPA's legislative history to suggest that Congress' failure to define expressly Btu content indicates, by itself, a conscious policy preference for either the wet or the dry rule" (*id.* at 20a). Despite these candid statements about the lack of support for its own view of the statute, the court below managed to hold that the Commission's accurate measurement rule not only was not compelled, but was barred by the NGPA. As we have shown in the petition, this holding rests on nothing more than what the court thought "Congress was *likely* to have been familiar" with (*id.* at 24a (em-

phasis added)) and on what Congress "*may* have *assumed*" (*id.* at 25a (emphasis added)) in enacting the statute. Certainly, the Commission's authority to issue a rule providing for accurate measurement of Btu's—whether such a rule be compelled by the statute or permitted as a matter of discretion—should not be nullified by a court based on the sort of "indirect" (*id.* at 25a) or "implicit" (*id.* at 30a) evidence on which the court of appeals relied in this case.

Respondents Interstate Natural Gas Association of America, et al. (INGAA) contend (Br. in Opp. 13-14) that the wet technique was a longstanding administrative practice under the Natural Gas Act and that Congress's silence in enacting the NGPA ratified that longstanding practice. This contention is flawed in several respects.

To begin with, this is not a case in which congressional ratification of a prior administrative practice may be inferred from "reenact[ment] [of] a statute without change," or from adoption of "a new law incorporating sections of a prior law." *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978). On the contrary, as this Court observed in *Public Service Commission* v. *Mid-Louisiana Gas Co.*, No. 81-1889 (June 28, 1983), slip op. 1-2, by enacting the NGPA "Congress comprehensively and dramatically changed the method of pricing natural gas produced in the United States." These changes involved a fundamental departure from the prior approach of pricing producer sales of natural gas under the Natural Gas Act. The NGPA "replaces the Commission's authority to fix rates of return to gas producers according to what is 'just and reasonable' with a precise schedule of price ceilings." *Mid-Louisiana*, slip op. 14. "The

new statutory rates are intended to provide investors with adequate incentives to develop new sources of supply." *Ibid.* Moreover, the NGPA ceiling prices are based on the Btu content of the gas, unlike the Commission's approach under the Natural Gas Act of pricing the gas on the basis of volume. Thus, respondents' ratification by silence theory falls of its own weight.

In addition, respondents overlook the fact that the Commission initially adopted the wet rule in the exercise of its discretionary authority in implementing the Natural Gas Act. Under settled principles, it is clear that the Commission remains free under the Natural Gas Act to exercise that same discretion in order to change the rule in favor of a more accurate measurement technique, so long as the rule change is supported by a reasoned analysis. See, *e.g.*, *Motor Vehicle Manufacturers Association* v. *State Farm Mutual Automobile Insurance Co.*, No. 82-354 (June 24, 1983), slip op. 26; *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968); *American Trucking Associations, Inc.* v. *Atchison, T. & S.F. Ry.*, 387 U.S. 397, 416 (1967). Under the decision below, however, the Commission has no discretion to promulgate a similar rule under the NGPA because, in the court's view, Congress implicitly codified the wet rule in the NGPA. This anomaly further undermines the court of appeals' conclusion.

2. Respondents also argue (AGD Br. in Opp. 8 & n.8; INGAA Br. in Opp. 11-12) that, by requiring Btu content of natural gas to be determined on an "as delivered" basis, the Commission has in effect increased first sale prices to a level above the maximum lawful prices set by Congress in the NGPA. This argument proves nothing because it is based

on respondents' own erroneous interpretation of the Act.

In our petition (at 12 n.12), we showed that use of the "as delivered" method would not increase any prices above the statutory ceilings, but would simply ensure that, consistent with the NGPA's purpose of providing incentives to producers for exploration and production of gas (see *Mid-Louisiana*, slip op. 14), a producer could receive up to the ceiling price for *each* MMBtu of gas delivered in a first sale. The "wet" method clearly does not achieve that result; instead, it results in a lowering of maximum lawful prices or an inclusion of "free" MMBtu's in each sale.[1] Accordingly, contrary to both the court of appeals (Pet. App. 28a) and respondents (AGD Br. in Opp. 15-16; INGAA Br. in Opp. 19), this case does not turn on a choice between "hyper-accurate measurements" and relatively accurate measurements. Rather, the dispute is over a choice between an accurate measurement technique and a demonstrably inaccurate technique that would frustrate the manifest intent of the NGPA to permit collection of maximum lawful prices for each MMBtu sold.[2]

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[1] Respondent INGAA seeks to dismiss our demonstration that the "wet" method either lowers NGPA ceiling prices or results in the transfer of "free" MMBtu's, by arguing (Br. in Opp. 21 n.18) that our discussion assumed the premise that the "as delivered" method is correct. But our discussion assumed only that the statute permits a seller to receive up to the ceiling price for each MMBtu sold—which is clearly what Congress intended—and, on that basis, we demonstrated that the "wet" method does not achieve that result.

[2] Respondent AGD incorrectly asserts (Br. in Opp. 17) that the "as delivered" method "would yield *no* additional accuracy" because results under this method would be based on a small sample of gas and also because the Commission stated

3. In our petition, we argued that, even if the "as delivered" rule was not affirmatively mandated by the NGPA, Congress left the matter to the Commission's informed discretion. Respondents contend (AGD Br. in Opp. 7-8; INGAA Br. in Opp. 9, 21-24) that the Commission is foreclosed from presenting this argument in this Court because it allegedly did not rely on this rationale in the orders under review and also because it allegedly did not raise this claim in the court of appeals. Respondents are incorrect.

To begin with, the Commission's order on rehearing contains numerous statements reflecting the view that the "as delivered" rule may be justified as a proper exercise of the Commission's discretionary rulemaking authority under the NGPA. For example, the Commission stated that "Congress left implementation of energy-referenced pricing for [certain] sections to the Commission" (Pet. App. 59a). Thus, respondents' charge that the Commission's present position is the result of "post-hoc rationalization" is refuted by the administrative record.

In addition, as the petitioners in No. 83-1171 point out in their reply brief (at 2-4), the question of the scope of the Commission's discretionary rulemaking

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that it would be agreeable to any reasonable method of determining Btu content. Respondent, however, ignores the fact that the maximum amount of water vapor in a stream of natural gas can easily be calculated by determining temperature and pressure at the time of gas delivery (see Pet. App. 86a). It was reasonable for the Commission to leave the frequency of this calculation to sellers and purchasers, based on their experience with changes in temperature and pressure. Moreover, respondent also chooses to overlook the fact that most gas sales contracts expressly provide that gas delivered to a pipeline shall contain no more than seven pounds of water per Mcf (*id.* at 67a n.17, 77a-78a).

authority under the NGPA was fully briefed and argued in the court of appeals. To be sure, as already noted in our petition (at 9 n.10), the court of appeals, relying on a footnote in the Commission's brief below, stated that "the Commission itself concedes that it was given 'no independent authority under the NGPA to define Btu' " (Pet. App. 29a-30a). But, as we also noted, the Commission argued in its petition for rehearing that, even if the NGPA did not compel adoption of the "as delivered" rule, "Congress left the matter to the ultimate discretion of the Commission" (FERC Pet. for Rehearing at 14; see *id.* at 14 n. 15, citing Section 501(b) of the NGPA, 15 U.S.C. 3411(b)). By raising this argument in its petition for rehearing, the Commission adequately preserved the point for submission to this Court. See *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 473 (1940).[3] Furthermore, the Commission's discretionary rulemaking argument, which finds direct support in the language and history of the NGPA, clearly "is relevant to the particular problem of statutory construction presented by this case" and is properly before the Court because " '[w]here the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived.' " *United States* v. *Speers*, 382 U.S. 266, 277

[3] Respondents' reliance (AGD Br. in Opp. 7 n.6; INGAA Br. in Opp. 22) on cases such as *United States* v. *Lovasco*, 431 U.S. 783 (1977), is entirely misplaced. In *Lovasco*, the Court noted that the government not only did not raise its procedural argument in its brief in the court of appeals, but also did not squarely raise the argument in its petition for rehearing as an alternative ground for rehearing the case en banc. *Id.* at 788-789 n.7. Here, in contrast, the Commission squarely raised the issue of its discretionary rulemaking authority in its petition for en banc review.

n. 22 (1965) (quoting from *United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805)).[4]

For the foregoing reasons and the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

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[4] Respondents (INGAA Br. in Opp. 28-29; Laclede Br. in Opp. 11-12) argue that there were procedural defects in the rulemaking proceeding that would nonetheless render the Commission's rule invalid. But, in light of its ruling on the statutory construction issue, the court of appeals did not address these procedural questions (see Pet. App. 18a, 30a). As respondent AGD correctly states (Br. in Opp. 4 n.4), if this Court were to grant the petitions for certiorari and reverse the judgment of the court of appeals, the appropriate course would be to remand the case to the court of appeals for adjudication of these additional issues.

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